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BRIEF OF

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IN THE SUPREME COURT OF THE UNITED STATES

No.....

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Petitioner,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of ROBERTA DOHENY, Deceased,

Respondent,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Petitioner,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of MARGUERITE DOHENY, Deceased,

Respondent.

BRIEF OF RESPONDENT

I

Statement of the Matter Involved

Deeming the outline in the Summary Statement of the Matter Involved, appearing in the petition for certiorari, too narrowly confined as to matters of record to which

the Court's attention should be directed we submit the following additional facts.

The contract, between the State of Montana and Coverdale and Johnson, contained, among others, the following provisions (R. Vol. 1 p. 82):

"It should be understood thoroughly by all concerned that all things contained herein, together with the 'Advertisement for Proposals' or 'Notice to Contractors,' and the 'Contract Bond,' as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these Specifications and Contract, and are to be considered one instrument."

The contract and surety bond for performance were sent to Coverdale & Johnson to be executed in a letter (Exhibit 3) from the State Highway Commission (R. Vol. 1, pp. 109-111) which reads:

September 26, 1934

USPWH Projects NRH-176 E, U 2 (1935)
and NRH-275 A, Unit 2 (1935)

Coverdale & Johnson,
c/o John M. Coverdale,
416 West Park Avenue,
Anaconda, Montana.

Gentlemen:

There are enclosed herewith two original numbers and two copies of your contracts for U. S. Public Works Highway Projects NRH-176 E, Unit 2 (1935) and NRH-275-A, Unit 2 (1935). In connection with each contract, please have the two originals of the contract and contract bond executed by both members of your firm, signing on the lines checked and having your signature witnessed by two persons. In each case, have the two originals of the (96) contract bond executed by your surety company. Then return the two originals for each project

to this office for execution by the Chairman of the Highway Commission. Your original numbers will be returned to you after final execution and approval.

In furnishing your surety bonds, the requirement set forth in Paragraph 3.4, page 4, of the Standard Specifications included in these contracts must be fully complied with, and the certificate referred to must be attached to the Highway Commission's original copy of the bond, which bond is bound in at the back of the contracts.

The copy of the contract marked for the contractor in each case is being furnished in accordance with Article 5.5 of the Standard Specifications. In conformity with this Article, it is expected that the contractor shall keep this copy continuously on the job. The second copy of the contract for each project is intended for the files of your bonding company.

You are reminded of the clause, which is included in Article 7.11, Page 11, Section 7 of the Standard Specifications, providing that you shall carry public liability insurance. The Commission has ruled that no payment on account of these contracts will be made until this office has been furnished with satisfactory information to the effect that this insurance has been taken out by you. Preferably, this information should be conveyed in the form of a letter to this department from the insurance agent who furnishes you the policy. Until this provision is complied with no payment can be made under the contracts.

Very truly yours,
STATE HIGHWAY COMMISSION,
By W. O. Whipps,
Administrative Engineer.

W-mo
Encls.

The United States Fidelity & Guaranty Company returned the executed surety bond to the State of Montana in the letter appearing on page 7 of the petition for certiorari, but neither the public liability insurance

policy referred to in the letter nor any copy thereof was ever furnished to the State Highway Commission (R. Vol. 1 pp. 114, 115).

The bond constituting part of the contract and executed by the contractors and the petitioner surety company was expressly conditioned for the faithful performance by the contractors of the entire contract inclusive of the provision requiring the carrying of liability insurance to "indemnify the public for injuries or damages sustained by reason of the carrying on the work" (R. Vol. 1, pp. 99-102).

The petitioner was paid the premium charges for writing both the surety bond and the liability insurance policy.

The insurance policy in specifying the immediate places where the contractors were carrying on their operations described same as "Unit No. 2, being construction of concrete and timber pile bridges Augusta-Sun River Road, Lewis and Clark County, Montana, and elsewhere in the State of Montana" (R. Vol. 1, p. 148).

The deceased girls' injuries and deaths were sustained at a point on Augusta-Sun River Road by reason of the carrying on of the work by the contractors within the insurance provision requirement of the highway contract for the improvement of such road and which insurance provision appears on page 6 of the petition for certiorari.

Prior to commencement of these actions in the District Court below, the administratrix, through her attorney, attempted to obtain access to the liability insurance policy to enable her to plead the facts, but the contractor Coverdale stated the policy had been lost (R. Vol. 1, pp. 124,

125), and the insurer company first refused and upon being notified that the respondent would compel the production of a copy by legal proceedings a copy of the daily report was furnished and in the letter accompanying the copy of the daily report the petitioner stated it was not possible to furnish an exact copy of the policy (R. Vol. 1, pp. 121-124, 128). The original policy and its contents were first fully disclosed (Exhibit 27) at the trial (R. Vol. 1, pp. 132-163) as defense evidence.

The statements appearing at page 9 of the petition for certiorari that "Estoppel was never pleaded or relied upon" and that "Estoppel was injected into the case for the first time in the decision of the Circuit Court of Appeals and appellant was never given any opportunity to meet it" undoubtedly are the result of oversight and misapprehension upon the part of the petitioner as to what the record discloses.

The facts which support an estoppel appear in the pleadings and in the evidence not objected to by the petitioner in the trial court and was alluded to in the opinion of the trial court and will be hereinafter particularly considered in discussing the legal questions proposed by the petition and brief of the petitioner.

II

Legal Questions

Summarized, the legal propositions urged by the petitioner for grant of a writ of certiorari under section 240 of the Judicial Code, 28 U. S. C. A. 347 and Rule 38, subdivision 5 of the rules of this Court, substantially are;

1. The Circuit Court of Appeals affirmed the judgments of the District Court on the ground of an estoppel which was not pleaded, nor proved, nor was available to the respondent. (Petition, pages 20-26).

2. The exclusions in the liability policy operated to relieve petitioner company from all liability. (Petition, page 20).

3. That the basis of the minority opinion in the Circuit Court conflicts with a prior decision of that Court and which this Court declined to review. (Petition, pages 38-41).

We shall discuss these contentions in the foregoing order.

Estoppel

1. Estoppel sufficiently pleaded.

Each of the complaints in the causes substantially allege the facts of the making of the contract between the State of Montana and Coverdale and Johnson, contractors, for the improvement of the Augusta-Sun River public highway, the provisions thereof requiring the furnishing of the performance bond for faithful performance of the contract and the carrying by the contractor of public liability insurance with a liability coverage "to indemnify the public for injuries or damages sustained by reason of the carrying on the work" under the contract and for the furnishing of evidence of taking out such public liability insurance (R. pp. 4-6, 28-29). The complaints further allege that subsequently the United States Fidelity Company notified the Montana Highway Commission that it had issued contractors' public liability insurance policy for said contractors under said contract,

that plaintiff (respondent here) had demanded the original or a copy of said public liability insurance policy from the contractors and from the United States Fidelity and Guaranty Company and that said persons failed and refused to furnish either and that "plaintiff is informed and believes and therefore alleges that under the provisions of said insurance policy and in accordance with the provisions of the agreement between the said co-partners and the State of Montana the defendant corporation promised and agreed to pay all claims for liability imposed upon the aforesaid co-partners by law for damages on account of bodily injuries including death at any time resulting therefrom sustained by any of the public by reason of the carrying on of the work mentioned and described in the contract between said co-partners and the State of Montana in connection with the public highway mentioned in said contract" (R. pp. 6, 29, 30). The complaints then set forth the injuries and deaths sustained by the deceased girls by reason of the gross negligence of the contractors in carrying on the work under the contract, subsequent suits, judgments in state courts and affirmance on appeal by the State Supreme Court, nonpayment, executions returned, participation by United States Fidelity and Guaranty Company in the conduct of the defenses in the state courts, notice and demand for payment on that company and nonpayment (R. pp. 7-10, 30-33). The Court will note from the facts alleged that at the time the complaints were drawn the plaintiff had been denied access to the original policy by the contractors on the representation that the same was lost (although it later showed up at the trial

as a part of the defense evidence (R. pp. 124, 125, 132-163) and had been denied a copy which the insurer company would vouch for as being a true copy, although a copy of the daily report was furnished, upon threat of a court order (R. pp. 121-124, 128), but with the qualifying statement of the insurer by letter that it was "not possible for us to give you an exact copy of the policy which was issued." (R. p. 123-124). The plaintiff assuming that the policy conformed to the requirements of the highway contract which fixed the measure of liability of the insurance policy thereunder alleged substantially such liability on the part of the insurer, and did not refer to any exclusions in the policy. The answers of defendant (petitioner), notwithstanding it had participated therein and had complete information and knowledge concerning the actions against Coverdale & Johnson in the state court, the trials, judgments and affirmance thereof on appeal (R. pp. 165-168), denied it had such information and knowledge (R. pp. 56, 59, 60) thereby requiring the plaintiff at the trial of these causes to introduce in evidence the entire judgment rolls of such cases in the present causes when tried below (R. Vol. 11, pp. 66, 67, 241-458). The answers also alleged the exclusion clauses of the policy quoted at page 6 of the petition herein (R. pp. 55, 56, 59).

The petitioner contends that since the respondent (plaintiff) below failed to reply the question of estoppel cannot be considered in these causes, relying on Rules 8 (c) and 12 (h) of the Rules of Civil Procedure and overlooking other pertinent sections of the rules.

Rule 7 (a) in so far as pertinent prescribes the plead-

ings allowed as "a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such" * * * "No other pleading shall be allowed, except that the court may order a reply to an answer." It is not and could not be contended that either of the answers herein contain a "counter claim denominated as such," since none such appears therein (R. pp. 55-61). The Court did not make any order requiring a reply nor did the petitioner at any time request the Court for such an order. Hence, plaintiff was not required to file a reply.

Rule 12 (h) relative to waiver of defenses and objections must be read with subdivision (b) of the same rule which provides for defenses to "a claim for relief in any pleading" to "be asserted in the responsive pleading thereto if one is required" and which also provides—"If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or in fact to that claim for relief."

Rule 8 (c) must be read with Rule 8 (d) which provides—"Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

No responsive pleading to the answer being required of plaintiff she could avail herself of any matters in avoidance of the averments of the answer warranted by the evidence.

Independent of the provisions of the rules referred to the facts constituting estoppel sufficiently appear in the pleadings. Briefly the complaints, respectively, allege the

facts concerning the highway contract, the performance bond, the contractual requirement for carrying liability insurance to indemnify the members of the public for injuries and damages sustained by reason of the carrying on of the work under the highway contract, the written representation by the insurer that it had issued public liability policies under the highway contract, the injuries and deaths sustained by reason of carrying on the work, the judgments, executions returned unsatisfied, affirmance of judgments on appeal, demands for payment and non-payment (R. pp. 3-15, 26-38). The facts among others upon which the lower appellate court's majority opinion was based are that the insurer company wrote the performance bond for faithful performance of the provision for public liability insurance and thereupon undertook to perform such a provision for a monetary consideration, and notified the State of Montana in writing that it had issued an insurance policy in accordance with the requirements of the contract, whereby the contractor obtained the benefits of the contract, and instead of the policy written conforming to the liability prescribed it contained an exclusion from liability, incompatible with the liability prescribed in the highway contract. These facts, with the exception of the writing of the limited liability policy containing the exclusion clauses, are alleged in the complaint (R. pp. 4-6, 27-30) and admitted by the answers (R. pp. 55, 58, 59). The defendant alleged in its answer the exclusion provisions of the policy (R. pp. 55, 56, 58, 59) and at the trial introduced the policy showing the exclusion clause as part of its defense (R. pp. 132, 134, 154, 155).

Any failure to allege in the complaint the fact as to the policy containing the exclusion clause was cured by the allegations of such fact in the answers and the introduction in evidence of such exclusion clause by the petitioner, the rules being that omissions and defects in a complaint may be supplied and cured by answer or by introduction of evidence of facts without objection made.

Texas & N. O. R. R. Co. et al. v. Fannie Miller, et al.,
221 U. S. 408, 55 L. ed. 789, 795;

In re Miller's Estate,
71 Mont. 330, 337, 229 Pac. 851;

Schmidt v. United States,
(C. C. A. 8th) 63 F (2d) 390.

The pleadings and evidence raised the question of estoppel in the trial court and the principle was expressly presented to that court on pages 14 and 15 in the brief of plaintiff submitted to that court prior to judgment (See appendix hereto). Rule 15 (b) Federal Rules of Civil Procedure provides for amendments of pleadings to conform to the evidence but failure to amend does not affect the trial of issues presented by the evidence. The rule further provides that even where objection is made to evidence as not being within the issues made by the pleadings amendments should be allowed when the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense and the court may grant a continuance to enable the objecting party to meet such evidence.

In the causes at bar petitioner made no showing or representation that it was prejudiced in its defense nor did it ask for any continuance to present additional evi-

dence nor did it petition the trial court for a rehearing or a new trial, nor move the court to reopen the case to put in any additional evidence.

It is a rule well established, in Federal Courts, that where evidence is admitted of issues not pleaded but the appealing party either failed to object to its admission or failed after objection to show substantial prejudice to the trial court this Court on appeal or certiorari will not disturb the judgment of the lower Court if the judgment was right on the merits, and the pleadings will be deemed amended to conform to the proof.

Sec. 269 Judicial Code,
28 U. S. C. A. Sec. 391;

Business Mens Assur. Co., v. Campbell,
(C. C. A. 8th) 32 F. (2d) 995,
Certiorari denied, 280 U. S. 594, 74 L. ed. 642;

Norton v. Larney,
266 U. S. 511, 69 L. ed. 413, 416.

In view of the provisions Rules 7 (a), 8 (d), and 12 (b) of the Federal Rules of Civil Procedure, referred to at pages 8, 9, ante, made applicable to cases removed from state courts to United States District Courts by Rule 81 (c), and by virtue of which no reply was required of plaintiff below, the discussion and citations of authority appearing at pages 22 to 25 of the petition herein are not pertinent. However, even if above rules 8 (d) and 12 (b) had not been in effect the courts are in agreement that in jurisdictions requiring a reply only where a counter-claim is pleaded in the answer, matters of estoppel may be established by the plaintiff without a reply as in such cases it is deemed that plaintiff has had no opportunity to plead the estoppel within the rule

that where a party has not had an opportunity to plead an estoppel evidence establishing same is properly admissible.

Baierly v. Riesenecker,
201 Wis. 459, 230 N. W. 605;

Calif. Breeders Assn. v. Showers,
86 Cal. App. 239, 260 Pac. 955;

The Philadelphia etc. R. R. Co. v. Howard,
13 How. 307, 14 L. ed. 157;

See 120 A. L. R. p. 76 where decisions are collected.

Where a defendant proceeds to trial without questioning the failure to reply he is deemed to have waived such failure of the other party.

Hooper v. First Exchange Nat'l Bank,
(C. C. A. 9th) 53 F (2d) 593.

On page 24 of the petition it is stated that defendant could have proven that it furnished a standard form policy. We do not believe such fact would defeat the right of recovery in this case. The statutes of Montana do not provide for a standard form of public liability insurance. The provision of the highway contract does not specify that a standard form of policy should be furnished. On the contrary it requires an insurance liability of a stated character and does not admit of exclusions in such policy which would defeat the purpose of the requirement. In addition to such requirement the petitioner herein failed to apprise the State Highway Commission that the policy written did not conform to the liability coverage required by the contract, nor did it exhibit the original policy or a copy thereof to the Commission. On the contrary by letter (R. pp. 113, 114) the petitioner represented it had issued a public liability policy under

the contract with a $20,000.00 liability limit. The same petitioner had executed the performance bond whereby it had obligated itself to the performance by the contractor of all of the provisions and conditions of the highway contract. On the strength of this letter the contractors received the benefit of the contract and the insurer received the benefit of the premium payment. Having received the benefit it should be required to assume the contractual insurance liability.

Section 8750 Rev. Codes of Montana, 1935.

Krpan v. Central Ins. Co.,
87 Mont. 345, 287 Pac. 217.

Before proceeding with discussion of other legal points which deny the right of petitioner to a writ of certiorari we respectfully direct the attention of the Court to the statement on page 12 of the petition, paragraph 1, that the Circuit Court was in error in holding for the first time on appeal that petitioner was estopped from relying upon the exclusions in the policy because not raised below or relied upon by plaintiff. The excerpts from brief of plaintiff in the trial court appearing in the appendix hereto will disclose that estoppel was urged to the trial court and a reference to the opinion of the trial court (the nine lines on bottom of page 181 and first seven lines on page 182 of the record) will show that the trial court predicated decision on the principle of estoppel of defendant to rely on the exclusion provisions of the policy antagonistic to the highway contract. The mere fact that the court did not use the word "estoppel" does not alter the principle involved. And the further fact that as a further ground of decision the court held that the policy

should be read as one with the agreement and the bond together with the evidence (R. p. 184) in arriving at the intention of the parties does not eliminate the principle of estoppel from the case.

In view of section 10605, subd. 3, Revised Codes of Montana, quoted on page 37 of the petition and the decisions cited certainly, as impliedly conceded by petitioner, the insurer's conduct was sufficient to render estoppel available as between the State of Montana and the insurer. However, petitioner contends that there being no representation made to the public such estoppel is not available to respondent. Petitioner overlooks the rule that estoppel operates upon and is available to the parties to the transaction and their privies.

19 Am. Jur. Sec. 152, p. 807.

The Supreme Court of Montana in Gary Hay & Grain Co., v. Carlson, 79 Mont. 111, @ 125, 255 Pac. 722, held that where a contract between the State Highway Commission and a contractor for improvements to a public highway contained a provision requiring the contractor to pay all persons furnishing material or performing labor, persons of such class furnishing materials or labor were entitled to maintain an action in their own name against the surety on the performance bond to recover for such materials and labor because where a contract expresses an intention to benefit a class of persons there is sufficient privity of contract between those coming within the class and the surety to support the suit even though the dominant purpose of the bond is the protection of the obligee.

The same court has decided that one who takes a lease

of shares of stock from a shareholder in an irrigation company, where the by-laws authorize the shareholder to lease same, is in privity with the company and may maintain an action to compel said company to furnish water to him.

Hyink v. Low Line Irrigation Co.,
62 Mont. 401, 205 Pac. 236.

In Slavens v. Standard Acc. Co., 27 F (2d) 859, (C. C. A. 9th) on appeal from the United States District Court for Montana, held that where an accident policy for indemnifying members of the public for injuries existed any person of that class after injury was the real person in interest under the contract and could maintain an action thereon.

See also Mourea v. Rhude,
(Minn.) 295 N. W. 304.

Respondent's intestates being members of the class (public) for whom the insurance protection was designed and expressly mentioned as beneficiaries of the insurance provision of the contract estoppel is available to respondent as administratrix.

To deny respondent the benefit of the judgments would result in permitting the insurer to take advantage of its own wrong contrary to Section 8746, Revised Codes of Montana, 1935.

Judgment Correct on the Merits

At the time the contract was made between the contractors and the State of Montana and the United States Fidelity and Guaranty Company executed the performance bond attached to the contract it knew the contract ex-

pressly provided that the formal agreement to which the bond was attached contained the express provision that the agreement and the bond and all supplemental agreements made or to be made were to be considered as one instrument (I. pp. 82, 83). It was presumed also to know that under the law of Montana the bond must be construed with and as a part of the highway contract.

Gary Hay and Grain Co. v. Carlson,
79 Mont. 111, 255 Pac. 722.

It knew that the contractors were expressly agreeing to carry public liability insurance to indemnify members of the public injured by reason of the carrying on of the work, and that it was obligating itself that such provision would be performed. Contemporaneously with the execution of the contract and bond it undertook, itself, to perform such provision of the highway contract and notified the State of Montana by letter that it had performed this particular obligation (R. pp. 113 and 114). It did not inform the State of Montana of any exclusions or limitations of liability. In view of these circumstances the contract, bond, and insurance policy should be read together as parts of substantially one transaction, each aiding the other in determining the true purpose and intent of the instruments, and the measure of liability required to be assumed by the public liability insurer.

The following authorities support this principle of construction.

"A contract may be explained by reference to the circumstances under which it is made and the matter to which it relates."

Sec. 7538 Rev. Code Montana.

"For the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of the parties whose language he is to interpret."

Sec. 10521 Rev. Code Montana.

By virtue of the above statutes the policy is to be construed with reference to the original contract and bond, and in addition the language of the policy is to be interpreted most strongly against the defendant company, who is responsible for the uncertainty.

Sec. 7545 Rev. Code Montana.

"Where several instruments are made at the same time in relation to the same subject matter they may be read together as one instrument and the recitals in the one may be limited by reference to the other. This rule obtains even when the parties are not the same if the several contracts were known to all parties and were delivered at the same time to accomplish an agreed purpose."

Peterson v. Miller Rubber Co.,
(C. C. A. 8th Cir.) 24 Fed. (2) 59;

Union Bank v. Himmelbauer,
57 M. 438, 188 Pac. 940;

Dodd v. Vucovich,
38 M. 188, 99 Pac. 296;

Fidelity & Dep. Co. v. Hershey,
(Colo.) 25 Pac. (2) 178;

Busch v. Hart,
(Ark.) 35 S. W. 534.

"Where several instruments are made as a part of one transaction they will be read together and each will be construed with reference to the other."

13 C. J. Sec. 487 p. 528.

In Gary, etc. Co. v. Carlson, et al., 79 Mont. 111, 255 Pac. 722, held, where a surety bond is given for performance of a contract the bond is made with relation to the contract and as a part of it, the two must be construed together and the surety binds itself to the performance of those acts which the principle promises to perform as a part of his contract and hence where a contractor promised to pay laborers and materialmen and fails to do so they may sue the surety directly on the bond in their own names as a contract made for their benefit as third parties under Section 7472 Rev. Code Montana.

With reference to the construction of insurance policies the following rules are applicable:

"The contract should be construed as a whole together with other papers or documents which constitute a part of the contract; a statutory regulation under the particular employment or acts in respect to which insurance is effected enter into and form a part of the policy and must be read in connection therewith. The policy is construed liberally in favor of the insured and against the insurance company. A liability insurer cannot invoke the strict rules of construction which apply for the protection of gratuitous sureties and narrow technical construction of the policy or of the petition in the former action against the insured for a liability covered by the policy is not permissible to defeat the insurance."

36 C. J. p. 1061, Sec. 14.
Creem v. Fidelity etc. Co.,
126 N. Y. S. 555, modified on other grounds
206 N. Y. S. 733, 100 N. E. 454,

"Where not inconsistent with other parts of the contract or incompatible with the surrounding facts and circumstances or the subject matter every material word should be given meaning and effect. However the

court is justified in ignoring part of the language of the contract where in view of the subject-matter it is meaningless, inapplicable or inoperative or where to give effect it would lead to unreasonable results defeating the manifest intention of the parties and the object and purpose they had in view in entering into the contract."

32 C. J. p. 1158, Sec. 268.

In determining whether a policy covers a liability the policy may be considered in view of the purpose for which it is sought and the result to be accomplished.

Biwabik Concrete Agg. Co. v. U. S. F. & G. Co.,
(Minn.) 288 N. W. 394.

Park Saddle Horse Co. v. Royal Indem. Co.,
81 Mont. 99, 261 Pac. 880.

Williams v. Pac. States Ins. Co.,
(Ore.) 251 Pac. 258.

Where an insurance company at the time of procuring the policy knows facts and circumstances which would render the policy void under a printed clause in the policy later written, it is held that by issuing the policy and accepting the premium the insurer is estopped to deny liability under the said clause in the policy.

Krpan v. Central, etc., Ins. Co.,
87 M. 345, 287 P. 217.

To same effect:
Johnson v. Ins. Co.,
70 M. 411, 226 Pac. 515.

The policy of insurance written in this case was not voluntary insurance, i. e. insurance written without compulsion. It was written under the compulsory insurance requirement of the highway contract, and the circumstances in this case are similar to the situation where for the protection of the public a statute requires in-

surance with a prescribed liability to be carried. In such cases the courts uniformly hold that the pertinent provisions of the statute are a part of the insurance policy and control where the policy provisions differ from the statutory liability.

Ocean Acc. etc., Corp. v. Torres,
91 Fed. (2) 464, 468 (C. C. A. 9th);
Malmgren v. Southwestern Auto Ins.,
(S. C. Cal.) 255 Pac. 512;
Ott v. Fidelity etc., Co.,
(S. C.) 159 S. E. 635, 76 A. L. R. 4;
Corwin v. Salter,
(Wis.) 216 N. W. 653;
Kruger v. Calif. Highway Indem. Co.,
(Cal.) 258 Pac. 602 Certiorari denied
72 L. ed. 430;
Arizona Mut. Ins. Co. v. Bernal,
(Ariz.) 203 Pac. 338;
Stone v. Inter-State Exchange,
(Wis.) 229 N. W. 26;
Opinions of Justices,
(Mass.) 147 N. E. 681.

The principle is discussed in cases referred to in annotation in 85 A. L. R. 28-30.

Protection of the public being the underlying reason both for statutory enactments and the provision in the highway contract in the causes at bar the same rule by analogy should be applied under Section 8740 Revised Codes of Montana, 1935, which provides that where the reason is the same the rule should be the same.

A further reason for construing the insurance policy with the highway contract is the ambiguity or uncertainty as to whether under the terms of the policy the injuries

and deaths of the Doheny girls are within the express coverage of the policy, notwithstanding the exclusion provisions. The accepted rule of construction is that a liability policy must be construed liberally in favor of the insured and strictly against the insurance company.

Commercial Casualty Co. v. Stinson,
111 Fed. (2) 63.

The policy expressly fixes the situs among others of the work or improvements as the Augusta-Sun River Road, Lewis and Clark County, Montana, and elsewhere in the State of Montana (R. p. 148) and expressly embraces injuries, including death, "by reason of and during the progress of the work described at the places named therein and elsewhere if caused by employees of the assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places," (R. p. 133). If the paragraph stopped at that point there could be no question that the deaths of plaintiff's intestates were within the protection of the policy, the evidence being that the injuries were sustained by reason of and "during the progress" of the work and were caused by employees of the assured whose duties required them to be at other places. The policy then protects against injuries and death caused by employees while engaged in the use or maintenance of an automobile upon the "insured premises" (R. p. 136), or caused by an "automobile" * * * "at the immediate places where the assured is carrying on his operations" (R. pp. 154, 155). Analyzing the policy applicable to the places described in Statement 4 several different meanings may be drawn.

It may be liberally construed as protecting against injuries caused by employees using automobiles at any place on the Augusta-Sun River Road on which the improvements were made but not elsewhere, or it may be construed as embracing only injuries caused by automobiles used by employees of the assured whose duties do not require them to be elsewhere than on the Augusta-Sun River Road, or again it may be construed as excluding injuries caused by employees using automobiles on the Augusta-Sun River Road which employees are required by their duties to be at other places from time to time, or it may be interpreted to mean that it protects against injuries caused by employees either at the places described provided that such injuries are not caused by automobiles, or it may be read to mean that it covers only injuries other than by automobile caused by employees while and whose duties require them to be at the place or places of operation and elsewhere and excludes injuries caused by employees whose duties require their presence at all times at the place of operations and never elsewhere. Scrutiny of the language of the paragraph will disclose that all of the above and additional varying meanings may be reasonably inferred. Further, the extent and place of coverage is described as injuries and death sustained "by reason of and during the progress of the work described in Statement 4 at the places named therein and elsewhere." Reference to Statement 4 (R. p. 148) will show that the places named are described in sufficiently broad language as to include the entire road unit known as the Augusta-Sun River Road, that is, the stretch of road between Augusta and Sun River, and

which includes the point on such road at Simms where the deceased were injured.

If the strict interpretation of the policy as contended by petitioner without resort to the surrounding circumstances, be adopted the only injuries covered by the policy would be those sustained while an employee is using or maintaining an automobile while physically standing or moving upon the uncompleted bridge or stockpass, an interpretation which leads to absurdity.

It will be observed that there is a conflict between the provisions of Paragraph 1 of the insuring agreement which excepts from liability injuries caused by employees using automobiles or other vehicles (R. pp. 133, 134) and the terms of exclusion No. 3 and endorsement (B) (Record pp. 154, 155) which inferentially protects from injuries by automobiles used or maintained upon the insured premises (R. p. 148) or at immediate places covered by policy where assured is carrying on his operations (R. p. 155). Manifestly the policy is uncertain as to intention as to what injuries are covered or what excepted, or what the places are within the protection of the policy where the assured is carrying on its operations. What can be designated with certainty as the "immediate places" where the assured is carrying on his operation as stated in the endorsement when considered with the provisions of paragraph 1 of the policy which describes the injuries within its protection as those sustained "by reason of and during the progress of the work described in Statement 4 and elsewhere"? (R. p. 133). Consequently the Court must look to the surrounding circumstances and

the purpose sought to be accomplished in order to say with certainty what the policy means.

> "A contract may be explained by reference to the circumstances under which it is made and the matter to which it relates."
>
> *Sec. 7538 Rev. Code Montana.*
>
> "For the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of the parties whose language he is to interpret."
>
> *Sec. 10521 Rev. Code Montana.*

By virtue of the above statutes the policy is to be construed with reference to the original contract and bond, and in addition the language of the policy is to be interpreted most strongly against the defendant company, who is responsible for the uncertainty.

Whether the judgments entered into in favor of respondent be right upon estoppel or under the principle of construing the highway contract bond and policy of insurance as one agreement or relating to substantially one transaction within the rules heretofore discussed, or whether supported by the decisions in Gary Hay and Grain Co. v. Carlson, 79 Mont. 111, 255 Pac. 722, and Federal Surety Co. v. Basin Construction Co., 91 Mont. 114, 126, 5 Pac. (2d) 775, referred to in the minority concurring opinion of Circuit Judge Haney, (R. pp. 474, 475) the same result is effected i. e. the protection of members of the public as intended by the highway contract.

The Court will note that there is ample authority here-

inbefore cited from the court of last resort of Montana supporting the judgments on the merits.

Where the trial court has rendered the right decision its action will not be reversed even though based on a wrong ground.

White Packing Co. v. Robertson,
(C. C. A. 4th) 89 F. (2d) 775;

United States v. Holt State Bank,
270 U. S. 49, 70 L. ed. 465, 469;

George O. Richardson Co. v. Scott,
276 U. S. 128, 72 L. ed. 497.

As to a question controlled by state law the law of the state will control in dealing with the construction of insurance contracts.

Ruhlin v. New York Life Ins. Co.,
304 U. S. 202, 82 L. ed. 1290.

On page 39 of the petition the petitioner refers to the case of National Surety Company of New York v. Ulmen, 68 Fed. (2d) 330, certiorari denied 78 L. ed. 1479. This decision was called to the attention of the District Court and Circuit Court of Appeals in the briefs submitted in those courts by the parties.

The cited case is clearly distinguishable both on the facts and law from the instant causes.

The Court in the cited case held that because the contract contained no provision requiring the contractor to pay members of the public for injuries sustained by reason of the failure of the contractor to provide barricades, lights and warnings, a member of the public injured was a stranger to the contract. Obviously there is a marked difference in the cited case where the members of the public were not mentioned and the present case where

the agreement expressly mentions members of the public and obligates both the contractor and his surety to furnish liability insurance to indemnify (in other words to pay) members of such public for the injuries sustained by reason of the carrying on of the contract work. In brief, the very conditions not existing under the contract and bond in the Ulmen case are present in the case at bar, to-wit, the respondent's intestates being members of the public protected by the contract and bond were not strangers to the contract (Slavens v. Ins. Co. 27 Fed. (2) 859) and there is an express provision in the contract for indemnification (or payment) of such persons as members of the class. To urge that the Ulmen case conflicts with the Circuit Court decision is to ignore the present contract provision for payment for the injuries under the insurance provision of the contract.

No Prejudicial Error Established

The burden is upon the petitioner to show prejudicial error to its substantial right in order to invoke the discretion and jurisdiction of this Court. This it has wholly failed to do.

Rule 61 Federal Rules of Procedure.

To induce the Court to exercise discretion favorable to the petition certain specifications from various contracts are set forth on pages 26 to 35 of the petition. None of the contracts contain a provision for liability insurance identical with the language used in the highway contract in this case which is quoted on page 6 of the petition for certiorari. With the exception of the contracts quoted paragraphs 4 p. 30, 5 and 6 p. 32 and 8

p. 34, the contracts require generally "Contractor's Public Liability Insurance" or "Contractor's Protective Public Liability Insurance" or "Protective Public Liability Insurance" or "employers' general liability insurance." Not one of these contracts specify "public liability insurance to indemnify the public for injuries or damages sustained by reason of carrying on the work," the language in the contract at bar. The provisions in the other contracts quoted in aforesaid paragraphs 4, 5 and 6 require liability insurance to protect from "claims for damages for personal injury, including accidental death," * * * "which may arise from operations under this contract."

The contract in paragraph 8 requires workmen's compensation insurance for payments "to workmen in case of temporary or permanent disability resulting from the work provided herein." None of the insurance policies written under any of the foregoing contracts are before the Court, nor any of the circumstances surrounding the furnishing of the policies are presented. Of necessity any questions arising under such contracts, containing different language than the contract before the Court, and the insurance policies issued cannot be determined by the rule applicable to the facts and circumstances now being considered.

The contracts quoted from were not offered in evidence in this case, and only purported copies of parts of these contracts are presented. It would be a strange innovation in the law and procedure of Courts that the respondent's rights arising out of certain specific instruments should be defeated or modified by certain limited pro-

visions from independent contracts with different language entered into by strangers and without a showing of similarity of surrounding facts and circumstances with those now before this Court.

It is urged (Petition p. 36) that the provisions of the contract in this case as well as the contracts quoted from are so broad as to indemnify the public irrespective of negligence. That question is moot. However, the words "public liability" insurance clearly refers to a liability imposed by law since if the injuries were sustained by reason of an act of the contractor which was not prohibited and which he could lawfully do there would be no liability under the familiar rule of damnum absque injuria.

Conclusion

It is respectfully submitted that neither the petition nor record herein discloses any prejudicial error or any of the grounds bringing the cause within the requirements of Section 240 of the Judicial Code, as amended 28 U. S. C. A. 347, and rule 38 of the rules of this Court, and therefore the petition for writ of certiorari herein should be denied.

E. J. McCabe

Attorney for the Respondent.